BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

ORIGINAL

In the Matter of	)	
	)	
Tariff Filing Requirements for Interstate Common Carriers	)	CC Docket No. 92-13

To: The Commission

REPLY COMMENTS

OF

WILLIAMS TELECOMMUNICATIONS GROUP, INC.

April 28, 1992

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SUMMARY

Congress has implicitly ratified the Commission's forbearance regime. Recent operator services legislation indicates that Congress knew of and accepted forbearance regulation as it amended the Communications Act.

Under forbearance, at least one tariffed carrier must provide service in a given market. Thus, the doctrine cannot be extended to include dominant carrier services.

In affirming the lawfulness of forbearance, the Commission should not rely on language in Sections 203(b) and 203(c) of the Act. While those sections can be interpreted to support the Commission's ability to waive the tariff requirement, contrary interpretations have been adopted by two circuits.

Neither Maislin nor MCI requires abandonment of forbearance. Those decisions turn on different facts and issues and congressional ratification would override those decisions even if they did apply.

If forbearance is illegal, then it is illegal for all carriers. Adopting a private carriage approach as a substitute for forbearance would replace a legally sound doctrine with one that violates established precedent and the anti-discrimination provisions of the Act.

The Commission should adopt transitional measures if it terminates forbearance, to protect reliance interests of customers and carriers. It should also, in that event, reform the tariff procedures applicable to competitive carriers.

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WILLIAMS TELECOMMUNICATIONS GROUP, INC.

Williams Telecommunications Group, Inc. ("WilTel"), on behalf of its common carrier operating subsidiaries, submits the following reply comments in support of the Commission's application of tariff forbearance to nondominant carriers.

I. INTRODUCTION

Comments in this proceeding submitted by customers,[1] LEC-owned IXCs,[2] resellers,[3] facilities-based nondominant IXCs,[4]

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[1]Ad Hoc Comments (users' group); ICA Comments (user association); First Financial Comments; IBM Comments. Abbreviated names of parties filing comments, together with the parties' full names, are set forth in Attachment I.

[2]RCI Comments; Sprint Comments.

[3]E.g., ACC Comments; ACI/BTI/USLD Comments; Commonwealth Comments; Interexchange Resellers Comments.

[4]LCI Comments; MCI Comments; Sprint Comments; WilTel Comments.

and others[5] all support the continuation of forbearance on legal and policy grounds.

In contrast, several dominant carriers contend that forbearance is unlawful.[6] MMR, a provider of public coast telecommunications, argues that forbearance prevents the Commission from monitoring tariff provisions and that adverse consequences have resulted in the international telex market.[7] Apparently, MMR is the only commenter opposing forbearance to consider the impact of the Telephone Operator Services Consumer Improvement Act of 1989 ("TOSCIA");[8] the other opponents elected not to address this issue.

II. TARIFF FORBEARANCE IS LAWFUL

A. Congressional Ratification

MMR contends that Congress did not ratify forbearance because TOSCIA: (1) did not re-enact Section 203; and (2) did not address common carrier tariff filings or forbearance.[9]

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[5]E.g., ALTS Comments (competitive access provider trade association); KIN Comments (LEC-owned centralized equal access provider).

[6]Alascom Comments; AT&T Comments; NYNEX Comments; US WEST Comments. PacTel and Southwestern Bell contend that forbearance, though lawful, must or should in certain cases be extended to dominant carriers. PacTel Comments at 3-9; Southwestern Bell Comments at 4-5. NCTA seeks adoption of a deaveraging requirement and is concerned that forbearance will lead to deaveraged long distance rates unless such a rule is adopted. NTCA Comments at 3.

[7]MMR Comments at 3-7.

[8]Id. at 7-8.

[9]MMR Comments at 8 (citing Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 381-82 n.66 (1982).

MMR incorrectly assumes that, because re-enactment of a statute can indicate congressional ratification of regulatory interpretations of the statute, that ratification can occur only in that manner.[10] Even though TOSCIA did not re-enact or incorporate Section 203, that legislation cannot be viewed in isolation from forbearance. Congress was aware of the interaction between forbearance and the new law and structured TOSCIA accordingly.[11]

The Commission need not, however, rely on re-enactment ratification. Supreme Court cases have also found ratification from congressional failure to change agency interpretations:

> Congress' awareness of the [agency policy] when enacting other and related legislation make out an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings.[12]

As to MMR's argument that TOSCIA does not address forbearance, it is literally true but analytically wrong. Sections 226(h)(1) and 226(h)(2),[13] enacted by TOSCIA, do not

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[10]In other words, MMR is promoting the "all dogs are animals, therefore, all animals are dogs" fallacy.

[11]See Ad Hoc Comments at 10-13; GTE Comments at 24; Sprint Comments at 11-14.

[12]Bob Jones University v. United States, 461 U.S. 574, 599 (1983); see also United States v. Riverside Bigview Homes, Inc., 474 U.S. 121, 137 (1985) (congressional failure to overturn "agency's construction of legislation is at least some evidence of the reasonableness of that construction"); United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979) (when Congress fails to alter agency's interpretation of statute although it is aware of interpretation and "has amended the statute in other respects, then presumably the legislative intent has been correctly discerned").

[13]47 U.S.C.A. §§ 226(h)(1), 226(h)(2) (West Supp. 1991).

expressly mention forbearance; but, by establishing tariff filing and review requirements, they certainly address perceived shortcomings in forbearance regulation. Essentially, Congress modified one aspect of forbearance and left it undisturbed in all other respects; further, it provided for the eventual return to full forbearance if consistent with the public interest.[14]

It would defy logic and principles of statutory construction to assume that Congress, in enacting these sections, intended them to conflict with or duplicate Section 203(a). Even without consulting the legislative history,[15] it is clear that Congress tailored TOSCIA to fit a forbearance regime, rather than a mandatory-tariff environment.[16]

B. Umbrella Regulation

Certain commenters argue that, if forbearance is applied to some carriers in a market, it must or should be applied to

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[14]Id. § 226(h)(1)(B).

[15]The legislative history reinforces this analysis. See, e.g., CompTel Comments at 9-10; IBM Comments at 5-6; Comments cited at note 11, supra.

[16]If the international record carriers referred to by MMR, MMR Comments at 6-7, are unlawfully using market power in one market segment to gain unfair advantages in other market segments, then the Commission should, upon filing of a complaint (or a petition for declaratory ruling): (1) declare the offending carriers to be dominant and (2) require them to file tariffs and cease providing anticompetitive bundling. MMR's concerns apparently implicate provisions of the Record Carrier Competition Act, Pub. L. 97-130, 95 Stat. 1687 (Dec. 16, 1981), codified at 47 U.S.C. § 222 (1988), and therefore may involve legal issues not considered in this proceeding.

all carriers in that market.[17] As WilTel discussed in its comments, one of the legal underpinnings of forbearance is the existence of at least one tariffed dominant carrier.[18] Dominant carriers seeking relief from the Section 203 requirements must petition Congress, not the Commission.[19]

C. Section 203 Interpretation

As several commenters note,[20] Sections 203(b) and/or 203(c) arguably allow the Commission to waive tariff filing requirements. WilTel did not advance such arguments because: (1) congressional ratification of forbearance makes such analysis unnecessary and (2) the few court decisions bearing on this issue support contrary positions. If the Commission wishes to reaffirm the legality of forbearance, it should do

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[17] Southwestern Bell argues that forbearance must, for constitutional reasons, be applied to all carriers. Southwestern Bell Comments at 4-5. Regulatory actions that do not establish suspect classifications (e.g., those based on race), do not affect fundamental liberties and that survive the arbitrary and capricious test will rarely if ever violate constitutional equal protection guarantees. See, e.g., Kushner, Substantive Equal Protection: The Rehnquist Court and the Fourth Tier of Judicial Review, 53 Mo. L. Rev. 423, 441 (1988) ("Generally, classifications utilized in business regulation pass constitutional muster under the equal protection clause except where the most arbitrary of rules are promulgated.")

[18] WilTel Comments at 6-7.

[19] The legislative history of TOCSIA confirms that Congress has not altered the tariff filing obligations of dominant carriers. See H.R. Rep. No. 213, 101st Cong., 1st Sess. (1989) ("It is not the Committee's intention to change the [tariff] filing requirements for dominant interstate interexchange carriers").

[20] E.g., ACI/BTI/USLD Comments at 3-5; GTE Comments at 12-15; ICA Comments at 3; MFS Comments at 5-7; OCOM Comments at 9-12; TMA Comments at 4.

so on grounds that are likely to survive judicial review. The best way to achieve that goal is to acknowledge Congress's endorsement of forbearance without adopting plausible, but judicially disapproved, interpretations of Section 203.[21]

D. Maislin and MCI

AT&T argues, with characteristic overzealousness, that the issue of tariff forbearance has already been resolved by Maislin and MCI; it claims that those decisions "held that statutory tariff filing requirements are mandatory for all common carriers."[22] The Maislin case contains no such "holding," nor could it; it dealt with different facts, different legal issues and a different statutory scheme.[23] The MCI court expressly declined to "hold" that tariff filing requirements are mandatory for all carriers.[24] If faced with that issue today, a court would have to consider the implicit ratification resulting from modifications of the Communications Act's tariff provisions that have occurred since the Sixth Report & Order,[25] in addition to the

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[21]But see First Financial Comments at 3 n.3 (context of D.C. and Second Circuit decisions substantially different from those in this proceeding.).

[22]AT&T Comments at 1-2.

[23]See ICA Comments at 3-4.

[24]765 F.2d at 1196.

[25]See MFS Comments at 8 n.5 (statements in MCI cannot withstand subsequent and contrary congressional action). The Sixth Report & Order, vacated in MCI, was adopted in November 1984. 50 Fed. Reg. 1215 (Jan. 10 1985). There have been three amendments to Sections 203 or 204 since that time, Pub. L. 101-396, § 7, 104 Stat. 850 (Sept. 28, 1990); Pub. L. 101-

important legal distinction between mandatory and permissive forbearance.[26]

III. ALL NONDOMINANT COMMON CARRIERS MUST FILE TARIFFS IF FORBEARANCE IS UNLAWFUL[27]

As WilTel indicated in its comments, if forbearance is unlawful, then the Commission must apply tariff regulation to all interstate services provided by common carriers. MCI correctly states that there appears "to be no legal or rational basis" to apply forbearance "to one class of non-dominant carriers, as distinct from others."[28]

Some commenters seek to remedy perceived legal defects in the Commission's current bifurcated regulatory regime with another form of bifurcation, in which certain telecommunications providers are considered private carriers or certain common carrier offerings are deemed to be private carriage. The Commission should decline these invitations to

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239, Title III, § 3002(b), 103 Stat. 2131 (Dec. 19, 1989); Pub. L. 100-594, § 8(b), 102 Stat. 3023 (Nov. 3, 1988), and, of course, TOSCIA was enacted in 1990. AT&T chose not to address Congress's ratification of forbearance in its comments.

[26]Even in the absence of congressional ratification, permissive forbearance, unlike mandatory detariffing, can be justified as a means of allocating enforcement resources. See MCI Telecommunications Corp. v. FCC, 765 F.2d 1186, 1190 n.4 (D.C. Cir. 1985).

[27]In sections III, IV and V, WilTel assumes arguendo that, notwithstanding congressional ratification, the Commission determines that forbearance is unlawful.

[28]MCI Comments at 46; accord MFS Comments at 14-16; Sprint Comments at 16 n.12.

jump out of the forbearance frying pan into the private carriage fire.[29]

The various private carrier proposals have tremendous logical and legal deficiencies and, unlike forbearance, have not been ratified by Congress. First, the Commission does not have unfettered discretion to classify companies as common or private carriers.[30] The smallest reseller can, during its first day in the market, operate as a common carrier if it offers service to all members of the public or a segment thereof. Resorting to a private/common dichotomy as a substitute for forbearance would impose unnecessary regulation on such companies, regardless of their market power.

Second, a single company cannot offer similar services on both a common and private carrier basis; to do so would violate the express commands of Section 202(a):

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination . . . for or in connection with like communications

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[29]The "definitional" theory of forbearance, under which carriers without market power are deemed to be private carriers, cannot be squared with the discussion of common carriage in the leading case on that issue, National Association of Regulatory Utility Commissioners v. FCC (NARUC I), 525 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976).

[30]American Telephone & Telegraph Co. v. FCC, 572 F.2d 17, 26 (2d Cir.) ("[T]he FCC is not at liberty to manipulate the definition of 'common carrier' in such a way as to achieve pre-determined regulatory goals."), cert. denied, 439 U.S. 875 (1978); NARUC I, 525 F.2d at 644 (rejecting "those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending on the regulatory goals it seeks to achieve. The common law definition of common carrier is sufficiently definite not to admit of any agency discretion in the classification of operating communications entities.").

> service, directly or indirectly, by any means or device . . . .[31]

The only purpose for allowing a carrier to provide similar services in a dual manner would be to enable it to discriminate in favor of or against purchasers of its common carrier services. If the discrimination is unreasonable, then Section 202(a) is violated; if it is not, then the so-called private carriage is actually common carriage.[32]

The Commission recently considered a variation of the private carriage scheme and determined that the record in that proceeding did not support adoption of such a plan.[33] Reclassifying offerings or carriers to avoid common carrier obligations has a much weaker legal foundation than forbearance and would have substantial practical disadvantages.

IV. EXISTING AGREEMENTS SHOULD NOT BE AFFECTED BY PROSPECTIVE REVOCATION OF FORBEARANCE

In its comments, WilTel suggested that equitable principles should apply to any transition from contract

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[31]47 U.S.C. § 202(a) (1988).

[32]The carrier, by not engaging in unlawful discrimination, would be undertaking to serve all people indifferently. See generally NARUC I, 525 F.2d at 641.

[33]Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, ¶ 91 n.150 (1991), recons. granted in part on other grounds, 6 FCC Rcd 7569 (1991), further recons. granted in part on other grounds, Memorandum Opinion and Order, April 17, 1992.

arrangements to tariffed services.[34] Since the filing of those comments, the Commission has noted, in another proceeding, that it has "grandfathered customers for equitable reasons before."[35] Such grandfathering can "facilitate a smooth transition to general tariffed rates and . . . avoid disruption of service to customers.[36]

In addition to protecting customers' reliance interests, it is also important to protect the interests of carriers. While no carrier should routinely seek to take advantage of the tariff process to abrogate customer contracts, IXCs should have sufficient freedom to establish workable tariffs. If existing long-term contracts contain minor variations, an IXC should be allowed to establish greater uniformity by adopting reasonable substitute provisions. For example, if most of a carriers' contracts provide for thirty days' notice prior to termination for nonpayment, while other agreements provide for from ten to forty five days' notice,[37] the IXC should be able

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[34]WilTel Comments at 11 (advocating one-year transition period). TCA supports a six-month transition. TCA Comments at 7 n.10. First Financial recommends an indefinite grandfathering period. See First Financial Comments at 15-19.

[35]Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Memorandum Opinion & Order on Recons., April 17, 1992, at 15 n.67. WilTel does not necessarily approve of the actions taken in that order, but agrees with the underlying premise, that grandfathering is properly used as a transitional tool.

[36]Id. (citing Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, Memorandum Opinion & Order, 4 FCC Rcd 8634, 8642-8644 (1989)).

[37]Much of the lack of uniformity results from the consolidations in the interexchange industry; a carrier acquiring another carrier "inherits" contracts that, inevitably, deviate from the standard provisions used by the

to select a thirty day period for all non-carrier agreements.[38]

The Commission could protect customers and carriers by permitting tariff changes to existing contracts upon sixty days' notice, during any transition period. Such changes would be subject to suspension or rejection and, in addition, customers would have the right to withdraw from existing commitments if they could demonstrate that the changes have a materially adverse effect.[39]

V. THE TARIFF RULES SHOULD BE REFORMED IF FORBEARANCE IS ABANDONED

None of the commenters appear to oppose further reform of tariff procedures if forbearance is deemed unlawful.[40] Rules applicable to competitive carriers should be streamlined; such

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acquiring carrier.

[38]Some changes to rate structures, such as those that are revenue neutral overall and have only a minor effect on any one customer, should also be permitted. This flexibility would allow IXCs to establish more uniform discount structures and nonrecurring price schedules.

[39]WilTel, in principle, agrees with TCA's concerns, TCA Comments at 2-3, 7-10, but believes the procedures it recommends should be modified. Immaterial changes in contract terms should be permitted, although an affected customer should have an opportunity to show that the revision has a material adverse effect. In addition, TCA's suggested requirement of 120 days' notice for tariff revisions affecting contracts seems excessive.

[40]AT&T asks that the tariff rules to which it is subject be further streamlined. AT&T Comments at 9-10. Given the short deadlines for submitting petitions to reject or suspend most AT&T tariff transmittals, customers and smaller carriers would already find it difficult to challenge the legality of AT&T tariff changes before they become effective.

streamlining should not be expanded to the point that the objectives of the tariff provisions of the Act, assuming they are applicable, are defeated. Tariffs should be understandable, comprehensive and subject to some review, at least upon filing of a petition to reject or suspend.

VI. OTHER ISSUES

NTCA correctly notes the interrelationship between the Commission's treatment of forborne carriers, access issues and rural telecommunications.[41] Unfortunately, smaller IXCs will be unable to serve rural areas if changes in switched transport rates place them at a significant cost disadvantage vis à vis AT&T, regardless of the level of regulation imposed;[42] the reduced competition in non-urban areas would harm smaller LECs and their customers, the groups represented by NTCA. Those issues, however, must be confronted in the switched transport docket,[43] and the issues in the instant proceeding, by comparison, will have little adverse impact on rural, as opposed to urban, areas.

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[41]NTCA Comments at 3-4.

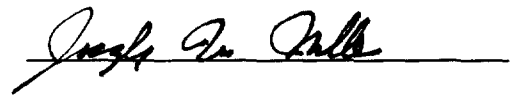
[42]Mandating geographic averaging for smaller IXCs would not solve the problems that would be created by adverse changes in switched access rate structures. Such a mandate would merely force smaller IXCs to withdraw from rural areas that they otherwise might be able to serve, albeit at a higher price, exacerbating the effects of transport restructuring. Under the current "equal charge rule," most small IXCs use averaged rates in order to simplify marketing, billing and administration.

[43]CC Docket No. 91-213.

VII. CONCLUSION

Even assuming, arguendo, that the Commission exceeded its authority when it adopted forbearance, forbearance has, in effect, been endorsed by Congress. Under Supreme Court precedent, that is sufficient to ratify the Commission's actions. Forsaking forbearance would have substantial and adverse consequences; no alternative scheme can satisfy the Commission's obligation to fulfill the objectives of the Communications Act.

WILLIAMS TELECOMMUNICATIONS GROUP, INC.



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April 28, 1992

JWM\FORBEAR.REP

ATTACHMENT I

WilTel uses the following abbreviated names to refer to parties filing comments in this proceeding.

Abbreviated Name	Full Name
ACC	ACC Long Distance Corp.
ACI	Automated Communications, Inc.
Ad Hoc	Ad Hoc Telecommunications Users Committee
Alascom	Alascom, Inc.
ALTS	Association for Local Telecommunications Services
AT&T	American Telepone and Telegraph Company
BTI	Business Telecom, Inc.
Commonwealth	Commonwealth Long Distance Company
CompTel	Competitive Telecommunications Association
CTI	Communications Transmission, Inc.
CTIA	Cellular Telecommunications Industry Association
Fairchild	Fairchild Communications Services Company
First Financial	First Financial Management Corporation
GCI	General Communication, Inc.
GTE	GTE Service Corporation
IBM	International Business Machines Corporation
ICA	International Communications Association
Interexchange Resellers	Interexchange Resellers Association
KNAD	KIN Network Access Division
LCI	LCI International
LOCATE	Local Area Telecommunications, Inc.
MCI	MCI Telecommunications Corporation
MFS	Metropolitan Fiber Systems, Inc.
MMR	Mobile Marine Radio, Inc.
NTCA	The National Telephone Cooperative Assoc.
NYNEX	NYNEX Telephone Companies
OCOM	OCOM Corporation
Pacific	Pacific Telesis Group

Abbreviated Name	Full Name
RCI	RCI Long Distance, Inc.
SBC	Southwestern Bell Corporation
Sprint	Sprint Communications Company L.P.
TCA	Tele-Communications Association
Telocator	Telocator
TMA	The Telecommunications Marketing Association
USLD	U.S. Long Distance, Inc.
U S WEST	U S WEST Communications, Inc.

CERTIFICATE OF SERVICE

I, Pamela S. Neff, do hereby certify that copies of the foregoing **Reply Comments of Williams Telecommunications Group, Inc.** were sent April 29, 1992, by first class mail, postage prepaid, to the following:

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